IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-516

LUCIO P. SALVUCCI,

Petitioner,

v.

THE NEW YORK RACING ASSN., INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT THE NEW YORK RACING ASSOCIATION INC. IN OPPOSITION

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Opinions Below

The Memorandum of Decision and Order dated December 3, 1975 of the United States District Court for the Eastern District of New York (Petition at 2a-5a) has not been officially reported. The Order of the United States Court of Appeals for the Second Circuit dated April 21, 1976 affirming on the opinion of the District Court (Petition at 6a-7a) has not been officially reported. Petitioner's Motion for Rehearing was denied by the United States Court of Appeals for the Second Circuit in an order dated July 16, 1976 (Petition at 7a-8a) which has not been officially reported.

Jurisdiction

Although the statute is not cited by Petitioner, jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

Question Presented

Is a monopoly on the use of an idea for a type of wager on horse racing conferred by the copyrighting of a description of such wager? The courts below, on the basis of well-settled precedent, answered this question in the negative.

Statement

This litigation is one of several instituted by Petitioner against racetracks in New York, Vermont, New Hampshire and Massachusetts. Indeed, just last month, this Court denied a Writ of Certiorari to Petitioner in two companion actions similar to this one brought by him in the United States District Court for the District of New Hampshire against racetracks there whose dismissals had been affirmed by the United States Court of Appeals for the First Circuit. *Salvucci* v. *New Hampshire Jockey Club, Inc.*, No. 76-111, *cert. denied,* 45 U.S.L.W. 3227 (October 4, 1976).

Simply stated, Petitioner's contention is that by copyrighting a three-sentence description of a form of parimutuel wager which he calls "Tri-3", in which the bettor must select in sequential order the first three horses to finish in a single race, he has been granted a monopoly on the use of such wager, and that Respondents infringed upon his idea by actually conducting at their racetracks a similar form of wager known variously as the "Triple" or the "Trifecta". Petitioner alleges that in 1963 he showed

his single-page copyright to Respondent The New York Racing Association Inc. ("NYRA"). Approximately 10 years thereafter, in 1973, The New York State Racing and Wagering Board ("the Board") the state agency which supervises racing and parimutuel wagering in New York, first authorized NYRA and other private racetrack proprietors to conduct Triple wagering at their racetracks pursuant to a regulation of the Board. NYRA thereupon instituted Triple wagering at its Aqueduct, Belmont Park and Saratoga racetracks.

Petitioner instituted this action in August 1975, naming as defendants NYRA, Roosevelt Raceway, Inc., The New York City Off-Track Betting Corporation and the Chairman of the Board's predecessor agency. Several of the defendants moved not only to dismiss pursuant to F.R.C.P. Rule 12(b)(6) on the ground that the complaint failed to state a claim upon which relief can be granted but also for summary judgment under F.R.C.P. Rule 56. On December 3, 1975, the District Court, Honorable Jacob Mishler, Chief Judge, dismissed the complaint, holding that:

> "The method of betting is not copyrightable. Novel and useful ideas may attain patent protection, but not copyright protection. . . . It is the manner of expressing and not the idea itself which is copyrightable." (Petition at 3a, 4a)

Judge Mishler also granted summary judgment to defendants, holding alternatively that even were the complaint interpreted to allege

> "an infringement of the expression of the betting method, rather than the method itself, the court finds no genuine issue of fact exists since plaintiff's method of expression was never employed by defendants.

"The limited copyright of the expression of the methods of betting was not infringed." (Petition at 4a-5a)

The Court of Appeals affirmed on the opinion of the District Court (Petition at 6a-7a) and denied Petitioner's motion for rehearing (Petition at 8a).

ARGUMENT

The dismissals of Petitioner's actions in both the First and Second Circuit Courts of Appeals are clearly correct, based upon the long-established principle that ideas are not copyrightable. In the landmark case of *Baker* v. *Selden*, 101 U.S. 99 (1879), this Court held that plaintiff's copyright of a book explaining a particular system of bookkeeping did not extend to provide him with a monopoly of the use of the bookkeeping system itself; which may be conferred only by a patent:

"[W]hilst no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practice and use the art itself which he has described and illustrated therein. The use of the art is a totally different thing from a publication of the book explaining it." (101 U.S. at 104)

See also Mazer v. *Stein*, 347 U.S. 201, 217 (1954); 1 *Nimmer on Copyright*, §§ 8.4, 8.5 (1976). The decision below falls squarely within the above principle and thus raises no important questions of Federal law.

Moreover, far from there being any conflict of decision among the Circuits, these precedents have formed the basis for an unbroken line of authority in the Federal courts. Thus, the United States Court of Appeals for the First

Circuit affirmed *per curiam* the dismissal of two actions similar to this one brought by Petitioner in the District of New Hampshire on the same ground as the dismissal in the present action, stating:

"[P]laintiffs find themselves unable to accept the fundamental difference between copyright and patent protection, although their case is a classic example or illustration of it." *Salvucci* v. *New Hampshire Jockey Club, Inc.*, No. 75-1434 (1st Cir., Mar. 1, 1976) (Unreported)

On October 4, 1976, this Court denied Certiorari. No. 76-111, 45 U.S.L.W. 3227. The same principle has been uniformly applied by the courts in other cases in which copyright protection was sought for the use of ideas, systems or games. Indeed, Petitioner is not the first to attempt to protect a wagering system under the copyright laws. A strikingly similar effort was rejected in *Briggs* v. *New Hampshire Trotting and Breeding Ass'n*, 191 F.Supp. 234 (D.N.H. 1960). The courts have consistently rejected efforts to obtain copyright protection for ideas for shorthand systems, *Brief English Systems, Inc.* v. *Owen*, 48 F.2d 555 (2d Cir.), *cert. denied*, 283 U.S. 858 (1931); card games, *Chamberlin* v. *Uris Sales Corp.*, 150 F.2d 512 (2d Cir. 1945); sweepstakes contests, *Morrissey* v. *Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967); lotteries, *Affiliated Enterprises, Inc.* v. *Gruber*, 86 F.2d 958 (1st Cir. 1936) and roller skating races, *Seltzer* v. *Corem*, 107 F.2d 75 (7th Cir. 1939); *Seltzer* v. *Sunbrock*, 22 F.Supp. 621 (S.D. Cal. 1938).

Further underscoring the distinction between patent and copyright protection is the fact that the form of wager which Petitioner's one-page copyright rudimentarily describes totally lacks any novelty. It is but a trivial and obvious variation of the Exacta, in which the first two horses to finish must be selected in order, and the Super-

fecta, in which the bettor attempts to select the first four horses in order. Petitioner makes no claim of entitlement as to either the Exacta or the Superfecta.

Petitioner's contrived claim that NYRA paraphrased his copyrighted expression is clearly without merit and is simply an effort to prevent Respondents from conducting the wager described. In the first place the excerpts from the description of the Triple which Petitioner incorrectly ascribes to NYRA in his appendix (Petition at 10a) are actually derived from a rule of the New York State Racing and Wagering Board authorizing the conduct of Triple wagering by harness racetracks. This is not even the Board rule pursuant to which NYRA, which operates thoroughbred tracks, conducts the Triple. Neither rule was ever published by NYRA.* Nevertheless, the courts below compared the claimed infringement with Petitioner's work and concluded that his method of expression was never employed by *any* of the defendants.

Petitioner cannot, as he is obviously trying to do, obtain copyright protection by virtue of the fact that the wagers described are so simple and basic that all descriptions of them must necessarily contain some similarity. The law is clear that similarity resulting from the fact that works deal with the same idea does not constitute infringement. *Morrissey* v. *Procter & Gamble Co., supra,* 379 F.2d at 678-79; *Chamberlin* v. *Uris Sales Corp., supra,* 150 F.2d at 513; *Affiliated Enterprises, Inc.* v. *Gruber, supra,* 86 F.2d at 961. Where, as here, the subject matter necessarily allows little variation in the form of its expression, there is a rigorous standard for proof of infringement, amounting to a required showing of appropriation in exact form or substantially so. *See, e.g., Continental*

*Petitioner never appealed from the dismissal by the District Court of his complaint as against the Board.

Casualty Co. v. *Beardsley,* 253 F.2d 702, 705-06 (2d Cir.), *cert. denied,* 358 U.S. 816 (1958); *Dorsey* v. *Old Surety Life Ins. Co.,* 98 F.2d 872, 874 (10th Cir. 1938); 2 *Nimmer on Copyright* § 143.11 at 626.2 (1976). As the courts below properly concluded, Petitioner has fallen far short of carrying this burden.

In short, the decisions below correctly rejected Petitioner's legal and factual claims and certainly raise no important questions of Federal law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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